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NOTES

THE LIFE & TIMES OF A CERCLA CLAIM IN BANKRUPTCY: AN EXAMINATION OF HAZARDOUS WASTE LIABILITY IN BANKRUPTCY PROCEEDINGS

INTRODUCTION

Heightened awareness of the health and environmental risks posed by exposure to hazardous substances prompted Congress in 1980 to enact the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").¹ CERCLA's aims are to

¹ 42 U.S.C. §§ 9601-75 (1988). CERCLA was enacted in response to the highly publicized environmental disasters that culminated in 1978 at Love Canal, New York. See SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, ENVIRONMENTAL EMERGENCY RESPONSE ACT, S. REP. NO. 848, 96th Cong., 2d Sess. 7 (1980) ("[S]hocking incidents at Love Canal gained wide attention and propelled the problems of inadequate hazardous chemical waste disposal into the national spotlight . . ."). In 1978 President Carter declared a national emergency at Love Canal, New York, resulting in the evacuation of hundreds of residents at the government's expense. See Note, *Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949, 949-50 n.1-4 (1980). It was discovered that the town of Love Canal was built on a landfill containing highly toxic chemicals that could cause birth defects, epilepsy, and other diseases. See Theodore Baurer, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 133, 136 (1980).

CERCLA was the first federal statute to respond directly to the release of hazardous substances into the environment. See Ridgway M. Hall, Jr. & Nancy S. Bryson, *Comprehensive Environmental Response Compensation and Liability Act*, in EMPLOYEE LAW HANDBOOK 109 (8th ed. 1985). Prior to CERCLA, the Resource Conservation and Recovery Act of 1976 (RCRA) was the major vehicle for federal enforcement of environmental laws. See H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120. RCRA, however, proved inadequate to deal with the consequences of waste disposal practices known as the "inactive hazardous waste site problem." *Id.* at 17-18, reprinted in 1980 U.S.C.C.A.N. at 6120. CERCLA, while certainly the most comprehensive, is not the only federal statute aimed at protecting the public and the environment. See, e.g., The Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2629 (1988) (regulating manufacture and distribution of new chemicals and monitoring all chemicals currently in use); The Clean

protect the public health and safety and to rectify environmental damage by authorizing the Environmental Protection Agency ("EPA") to remove hazardous waste at dump sites and to assess related cleanup costs against the responsible parties.² However, the

Air Act, 42 U.S.C. §§ 7401-7642 (1988) (regulating air pollution standards); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (1976) (regulating drinking water standards). States have added their own environmental statutes to complement existing federal laws. *See, e.g.*, GA. CODE ANN. §§ 43-2901 to 43-2922 (1986 & Supp. I 1991) (Georgia Hazardous Waste Management Act); N.J. STAT. ANN. §§ 26:2C-1 to 26-25 (West 1987 & Supp. I 1991) (Air Pollution Control (1954)); N.C. GEN. STAT. §§ 143-215.75 to 143-215.94II (1990 & Supp. I 1991) (Oil Pollution and Hazardous Substances Control Act of 1978).

Although CERCLA is the most commonly invoked environmental statute, it has been characterized as "badly drafted and . . . silent on more important issues." David E. Jones & Kyle E. McSlarrow, . . . *But Were Afraid to Ask: Superfund Case Law, 1981-89*, 19 ENVTL. L. REP. 10430, 10430 (1989).

² *See* 42 U.S.C. §§ 9601-9675 (1988). CERCLA establishes a program for environmental response action to protect public health and the environment from the dangers of hazardous waste sites. *Id.* § 9602. The government can clean up the waste site itself or seek an injunction requiring the responsible parties to remove the waste. *Id.* § 9604. Section 9607 lists which "responsible parties" can be held liable under CERCLA. *Id.* § 9607. It provides, in pertinent part:

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Id. CERCLA established a "Superfund" to finance the cleanup operations by authorizing the government, or an innocent third party, to abate the danger and receive reimbursement for response costs directly from the fund. *Id.* §§ 9611, 9631. The Superfund serves to avoid lengthy and expensive litigation against an environmental polluter by providing prompt payment to the party who incurred cleanup costs. The Fund then assesses the costs against the responsible party. *Id.*; *see also* H.R. REP. NO. 1016, *supra* note 1, at 17-18, *reprinted in* 1980 U.S.C.C.A.N. at 6134, 6136 (purpose of Superfund is to pursue rapid recovery of cleanup costs and to impose strict liability against responsible party). The Superfund is partly funded by imposing an excise tax on the oil and petro-chemical industries on the

staggering costs associated with environmental liability³ have led many individuals and corporations to seek bankruptcy protection from the financial burden of CERCLA claims.⁴ Filing for bankruptcy protection allows a party with CERCLA liability in existence prior to filing ("pre-petition") to emerge from the proceedings discharged of this liability.⁵ In addition, the filing of the

theory that those who benefit from creating waste should bear the costs. See 26 U.S.C. §§ 4611, 4661 (1988). The Fund originally appropriated \$1.6 billion for cleanup actions. The amount was raised to \$8.5 billion with the passage of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

³ See PRACTICING LAW INST., THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 12 (1990). "The costs of studying and remediating sites is also increasing rapidly. The estimated average cost of the Remedial Investigation/Feasibility Study ('RI/FS') is approximately \$1 million. The estimated average cost of implementing remedial action is approximately \$25 million, although there are many instances of cost estimates ranging far in excess of \$100 million." *Id.*; see also *In re Charles George Land Reclamation Trust*, 30 B.R. 918, 920-21 (Bankr. D. Mass. 1983) (estimating cleanup costs at \$5-10 million); 1A FRANK P. GRAD, A TREATISE ON ENVIRONMENTAL LAW § 4A.02[4], at 4A-141 (1990) (noting expense of cleanup costs); Charles McCoy, *Exxon Corp.'s Settlement Gets Court Approval*, WALL ST. J., Oct. 9, 1991, at A3 (Exxon Corp. settled Alaskan Oil spill for \$1.05 billion—estimates for total damage range from \$3 billion to \$10 billion); Daniel Wise, *Courts Rule on Clean-up Costs*, NAT'L L.J., Oct. 14, 1991, at 3 (estimating \$60 billion in cleanup costs by year 2000).

⁴ See Norman I. Silber, Note, *Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 870, 871 n.14 (1985).

⁵ See 11 U.S.C. §§ 524, 727 (1988). Section 524 outlines the effect of a discharge in bankruptcy. *Id.* Only those debts arising prior to the bankruptcy filing ("pre-petition") are dischargeable. See *In re Neier*, 45 B.R. 740, 743 (Bankr. N.D. Ohio 1985). The exceptions to the discharge are listed in § 523 of the Code. 11 U.S.C. § 523 (1988). Among other things, the Code excepts alimony payments, money obtained under "false pretenses," and certain taxes, fines, and penalties, but there is no exception for environmental claims. *Id.*

For bankruptcy purposes, a debt is a liability on a claim, and such claim is governed by the provisions of the Code. See 11 U.S.C. § 101(4) (1988). When the government cleans up a waste site created by the debtor, the government becomes a creditor, and the debtor is obligated to repay the government for its response costs. See 11 U.S.C. § 9607. An environmental liability is treated as any other debt, and consequently, the government is treated as an unsecured creditor. See 11 U.S.C. § 101(11) (1988); Douglas G. Baird, *Environmental Regulation, Bankruptcy Law, and the Problem of Limited Liability*, 18 ENVTL. L. REP. (ENVTL. L. INST.) at 10352-53 (1988).

One of the goals behind the Bankruptcy Code is to relieve the debtor of past obligations. DAVID L. BUCHBINDER, FUNDAMENTALS OF BANKRUPTCY § 26.8 (1990). Before this goal can be accomplished, creditors' claims must be satisfied. See 11 U.S.C. § 1129 (a). The gathering in, or "marshalling," process aids in distributing the debtor's assets efficiently and equitably to creditors so that the debtor can begin a "new life." See *In re Coombs*, 86 B.R. 314, 318 (Bankr. D. Mass. 1988).

One of the basic purposes of the former Bankruptcy Act, as well as the present Bankruptcy Code, is to give the debtor a "new opportunity in life and a clear future for future effort, unhampered by the pressure and discouragement of pre-existing debt." See Lines v. Frederick, 400 U.S. 18, 19-20 (1970); see also BENJAMIN WEINTRAUB & ALAN N. RESNICK, BANKRUPTCY LAW MANUAL ¶ 8.23[5] (1986) ("Confirmation of a plan marks the beginning of

bankruptcy petition blocks creditors' efforts to enforce their pre-petition claims by imposing an automatic stay on most legal proceedings against the debtor.⁶

Since CERCLA claims are subject to the provisions of the Bankruptcy Code,⁷ the government is impeded in its ability to collect response costs and to issue cleanup orders when the responsible party is a debtor in bankruptcy.⁸ Thus, the Bankruptcy Code's

the reorganized debtor's new financial life.").

The Bankruptcy Code allows individuals to be discharged from debts in Chapter 7 liquidation, Chapter 11 reorganization, and Chapter 13 debt adjustments. Corporations only receive a discharge in Chapter 11 reorganizations. *Id.* § 3.01. This Note will focus on the interaction of CERCLA claims in Chapter 11 cases, both individual and corporate, unless otherwise stated.

⁶ See 11 U.S.C. § 362 (1988). Basically, the automatic stay "stops collection efforts pending a determination of the creditors' and debtors' rights by the bankruptcy court." WEINTRAUB & RESNICK, *supra* note 5, ¶ 1.09[1]. The automatic stay shields the debtor from the financial pressures of having to answer its creditors' claims. See *In re Stringer*, 847 F.2d 549, 551 (9th Cir. 1988). In addition, the stay benefits all creditors because it prevents a scramble for the debtor's assets which would be detrimental to a creditor who was slow to react to the bankruptcy. See *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1069 (5th Cir. 1986). Section 362 of the Code provides in pertinent part:

(a) [the filing of a bankruptcy petition operates as a stay of]

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title

11 U.S.C. § 362(a). There are exceptions to the automatic stay which permit the commencement or continuation of certain actions notwithstanding the bankruptcy. See 11 U.S.C. § 362(b).

⁷ See *Ohio v. Kovacs*, 469 U.S. 274, 278-83 (1985). The Supreme Court held in *Kovacs* that Ohio's action to enforce an injunction against the debtor for polluting public waters was a "claim" within the language of the Bankruptcy Code and therefore subject to the provisions of the Code. *Id.* The Code defines "claim" broadly. *Id.* at 279. Section 101(4) defines claim as follows:

(4) "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy or breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

See 11 U.S.C. § 101(4).

The moment a bankruptcy petition is filed an "estate" is created by operation of law, which consists of all the interests in property previously owned by the debtor. See WEINTRAUB & RESNICK, *supra* note 5, ¶ 4.03. Sections 541(b) and 522 list which property is expected and exempted from the estate, respectively. 11 U.S.C. §§ 541(b), 522.

⁸ See Michael B. Guss, Comment, *Ohio v. Kovacs: The Conflict Between Federal*

goal of rehabilitating the fiscal health of financially troubled debtors⁹ conflicts with CERCLA's equally important goals of protecting the environment and promoting the public health and safety.¹⁰ Consequently, in attempting to resolve the various issues created by CERCLA claims in bankruptcy proceedings, the courts have reached divergent results.¹¹

The issues associated with these proceedings include (1) whether the EPA's CERCLA claim arose pre-petition or post-petition;¹² (2) whether the claim should be accorded priority treatment as an administrative expense;¹³ (3) whether the claim represents a money judgment, a cleanup order, or merely an injunction to stop polluting;¹⁴ and (4) whether the bankruptcy trustee may abandon contaminated property in order to avoid spending estate funds to clean up the property.¹⁵

This Note will examine the conflicting policies raised by the

Bankruptcy Laws and State Environmental Regulations, 34 AM. U. L. REV. 1263, 1264-65 (1985). The government will not collect the full value of its claim if the debtor's assets are insufficient to pay all of the claims asserted against the estate because the discharge will bar further recovery after the bankruptcy proceedings. See *supra* note 5 (discussion of discharge).

In addition, the automatic stay freezes the government's efforts to enforce CERCLA claims. See *supra* note 6 and accompanying text. But see *infra* notes 46-47 and accompanying text (discussing exceptions to automatic stay on government units).

In addition, the trustee or debtor in possession can abandon property, even contaminated property, if it becomes burdensome to the estate, and the waste presents no "imminent" danger to the public health and safety. See 11 U.S.C. § 554; *infra* notes 79-83 and accompanying text.

⁹ See *In re Rusty Jones Inc.*, 110 B.R. 362, 375 (Bankr. N.D. Ill. 1990). The fundamental purpose of Chapter 11 is to "enable a distressed business operation to reorganize its affairs in order to prevent the loss of jobs and the adverse economic effects associated with disposing of assets at their liquidation value." *Id.*; see also *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985) (purpose of Chapter 11 is to return on-going business to viable state); H.R. REP. NO. 595, 95th Cong., 1st Sess. 220 (legislative history states that where possible, bankruptcy law favors rehabilitation over liquidation), reprinted in 1978 U.S.C.C.A.N. 5963, 6179.

¹⁰ See *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 349-50 (D.N.J. 1991) (stating CERCLA's goal to protect public health and safety); H.R. REP. NO. 253, 99th Cong., 1st Sess. 54-56 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2836-38 ("The Superfund program to clean-up abandoned hazardous waste sites is one of this Nation's most important environmental programs designed to protect human health and the environment.").

¹¹ See generally Katherine S. Allen, Note, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Clean-up*, 38 VAND. L. REV. 1037 (1985) (examining conflict between Bankruptcy Code and hazardous waste law).

¹² See *infra* notes 17-34 and accompanying text.

¹³ See *infra* notes 35-43 and accompanying text.

¹⁴ See *infra* notes 49-76 and accompanying text.

¹⁵ See *infra* notes 83-92 and accompanying text.

foregoing issues and the disparate results reached by the courts. Part One will discuss recent decisions that have determined when a "claim" for environmental liability arises for purposes of determining dischargeability. In addition, Part One will propose that post-petition cleanup costs should be given priority as an administrative expense even if the claim is deemed to have arisen prior to the filing of the bankruptcy petition. Part Two will discuss the governmental unit exception to the automatic stay provision and suggest that although the government's order may be deemed an attempt to enforce a money judgment, it is a valid exercise of the government's police and regulatory power. Finally, Part Three will examine the trustee's power to abandon contaminated property in order to avoid cleanup costs.

I. CERCLA LIABILITY AS A BANKRUPTCY "CLAIM"

A. *When Does a CERCLA Claim Arise?*

The Bankruptcy Code's purpose of giving the debtor a "fresh start" is effectuated by providing for the discharge of the debtor's pre-petition debts.¹⁶ Therefore, it is essential to determine whether a claim existed when the petition was filed, in order to assess its dischargeability. However, the courts disagree as to whether a CERCLA claim is "pre-petition" or "post-petition" when the government incurs post-petition response costs for the cleanup of a

¹⁶ 11 U.S.C. § 524. It is the policy of the Bankruptcy Code to discharge as many obligations as possible in order to allow the debtor to begin a new life. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("fundamental purpose of reorganization is to prevent the debtor from going into liquidation"). The Code's fresh start objective is in the "public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns . . . a new opportunity in life and a clear future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (referring to the Bankruptcy Act—the Code's predecessor); see also COLLIER ON BANKRUPTCY ¶ 524.01[1] (15th ed. 1993) (citing legislative history which stated "purpose of legislation is to effectuate . . . the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors").

Legislative history demonstrates that Congress intended to construe "claim" broadly so that "all legal obligations of the debtor, no matter how remote or contingent will be able to be dealt with in the bankruptcy proceedings." S. REP. NO. 989, 95th Cong., 2d Sess. 22 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5808; H.R. REP. NO. 598, 95th Cong., 2d Sess. 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6266. By broadly defining "claim," "the Code aims to provide more complete relief for the debtor, since claims that would have remained outstanding under previous bankruptcy law are now subject to the discharge." Lori Jonas, Note, *Dividing the Toxic Pie: Why Superfund Contingent Contribution Claims Should Not Be Barred by the Bankruptcy Code*, 66 N.Y.U. L. REV. 850, 867 (1991).

waste site in existence prior to the bankruptcy.¹⁷ In fact, the presence of a hazardous waste site is often not discovered until some time after the bankruptcy proceeding has been initiated; thus, the EPA will not have taken any action in response, including the filing of a claim against the debtor.¹⁸

While a few courts have held that a CERCLA claim does not arise until response costs are actually incurred,¹⁹ the majority of courts have determined that a claim accrues when the underlying acts giving rise to the claim occur—such as a spill or leakage.²⁰

In *In re Chateaugay Corp.* (“LTV”),²¹ the Second Circuit examined costs incurred by the EPA after the debtor’s bankruptcy filing, which were in response to pre-petition conduct.²² The EPA argued that since the cleanup was undertaken *after* the bankruptcy petition was filed, its claims for reimbursement arose post-petition and thus were not subject to discharge.²³ The Second Circuit disagreed, holding that when a “release or threatened release” of hazardous waste occurs prior to bankruptcy, the existence of the hazardous condition gives rise to a pre-petition “contingent” claim for cleanup costs that is dischargeable in bankruptcy.²⁴ The Second Circuit based its decision on the Code’s broad definition of “claim” which includes any “right to payment, whether or not such right is reduced to judgment, liquidated, *unliquidated*, fixed, *con-*

¹⁷ See *infra* notes 19-30; Richard P. Krasnow, *Environmental Issues in a Bankruptcy or Reorganizational Proceeding: A Bankruptcy Lawyer’s Perspective*, 18 ENVTL. L. REP. 10355, 10357 (1988).

¹⁸ See, e.g., *In re Torwico Elecs. Inc.*, 131 B.R. 561, 562-63 (Bankr. D.N.J. 1991), *rev’d in part, vacated in part*, No. CIV 92-1828, 1992 WL 465754 (D.N.J. Dec. 8, 1992); see also Jonas, *supra* note 16, at 857 n.56.

¹⁹ See, e.g., *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316 (9th Cir. 1986); *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1450-52 (S.D. Fla. 1984); *United States v. Price*, 577 F. Supp. 1103, 1110 (D.N.J. 1983); see also *In re Remington Rand Corp.*, 836 F.2d 825, 833 n.7 (3d Cir. 1988) (deciding government does not have claim until aware of its “right to payment”); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 943 (3d Cir.) (ruling asbestos exposure does not give rise to cause of action until injury discovered), *cert. denied*, 474 U.S. 864 (1985).

²⁰ See *In re Jensen*, 127 B.R. 27, 32 (Bankr. 9th Cir. 1991) (noting “claim arises based upon the debtor’s conduct”); see also 1A GRAD, *supra* note 3, § 4A.02[4] at 4A-148.1-148.2 (discussing courts’ analysis of when CERCLA claim arises).

²¹ 944 F.2d 997 (2d Cir. 1991).

²² *Id.* at 1000.

²³ *Id.* Post-petition claims are not dischargeable. See *Bush v. Taylor*, 912 F.2d 989, 993 (8th Cir. 1990); *In re Rosteck*, 899 F.2d 694, 696 (7th Cir. 1990).

²⁴ *Chateaugay*, 944 F.2d at 1005. The release or threatened release of hazardous waste is the triggering event which results in a future right to payment (a “contingent” claim). *Id.* at 999.

tingent, matured, unmatured, disputed, undisputed, legal, equitable, [etc.]."²⁵ Thus, the *LTV* court held that a CERCLA claim arises at the moment the statute is violated since a violation gives the government a right to payment; the court recognized, however, that it was choosing an arbitrary point in time.²⁶

Although the approach taken in *LTV* appears to be the emerging trend, it has not been universally adopted. In *United States v. Union Scrap Iron & Metal*,²⁷ the district court held that a release or threatened release of hazardous waste prior to bankruptcy does not give rise to a contingent claim until the government actually incurs response costs.²⁸ The court concluded that nonbankruptcy substantive law defines when a claim arises;²⁹ under CERCLA and the relevant substantive law, a cause of action only exists when response costs are incurred.³⁰

It is submitted that the underlying acts approach taken by the majority of courts extends the Code's definition of claim beyond that intended, to the detriment of CERCLA and the environment.

²⁵ 11 U.S.C. § 101(5)(A) (1988) (emphasis added); see also *supra* note 7 and accompanying text (discussing "claim").

²⁶ See *Chateaugay*, 944 F.2d at 1005. The Second Circuit agreed with the district court's determination that "[t]his ruling covers releases that . . . have not . . . [yet] been discovered by [the] EPA (or anyone else)." *Id.* at 1000; see also *In re Jensen*, 127 B.R. 27, 33 (Bankr. 9th Cir. 1991) ("[C]laim arises for purposes of discharge upon the actual or threatened release of hazardous waste by the debtor."). But see *In re M. Frenville Co., Inc.*, 744 F.2d 332, 335 (3d Cir. 1984) (determination of when claim arises dependent on when cause of action brought), *cert. denied*, 469 U.S. 1160 (1985).

²⁷ 123 B.R. 831 (Bankr. D. Minn. 1990).

²⁸ *Id.* at 835-36. The EPA sought approximately \$1.2 million in response costs from the debtor and numerous other defendants for the improper storage and leakage of lead and other hazardous materials into the soil and water. *Id.* at 832-33. The leakage began prior to the bankruptcy filing; however, the EPA did not find the contaminated property until after the bankruptcy filing. Moreover, some sites were not found until after confirmation of the plan of reorganization. *Id.* at 834. The court rejected the debtor's argument that the EPA had a "contingent" claim at the time of the filing since, such a claim requires that both the EPA and the debtor have previously contemplated the occurrence of some future event, such as leakage, which would give rise to the debtor's obligation to pay. *Id.* at 836. The court held that neither the EPA nor the debtor had "actual or presumed contemplation" of the leakage at the site in question. *Id.*

²⁹ *Id.* at 835.

³⁰ *Id.* The court stated that a claim does not exist until all the elements necessary to create a legal obligation exist under the relevant substantive nonbankruptcy law. *Id.* Under CERCLA, four elements must be established to give rise to a legal obligation: "(1) there must be a facility; (2) there must be a release or threatened release of a hazardous substance at the facility; (3) there must be a responsible person. . . ; and (4) the United States must have incurred necessary costs in responding to the release at the facility." *Id.* The last element — incurring response costs — had not been met at the time of the bankruptcy filing; therefore, no legal obligation existed under CERCLA. *Id.* at 836.

Such a broad definition of "claim" allows debtors to discharge CERCLA liability that the creditor (EPA) is unaware of and thus, unable to file a claim for in the proceeding. Consequently, such "claims" will often not receive any payments under the bankruptcy.

In addition, while the Code requires notice to creditors with possible claims against the debtor, such notice is useless to the EPA, as a creditor, without knowledge of the debtor's potential CERCLA liability. Allowing the discharge of unknown claims thus vitiates the Code's requirement of notice to creditors. Moreover, such a policy will encourage debtors to file bankruptcy before the EPA becomes aware of CERCLA violations in order to avoid allocating resources to the partial payment of such claims.

On the other hand, it is submitted that limiting the dischargeability of CERCLA claims to those that the EPA has responded to properly balances the policies underlying CERCLA and the Code. Such an approach will actually encourage a potentially responsible party to apprise the EPA of all of its waste sites in order to maximize the dischargeability of CERCLA claims. Thus, the EPA will be in a position to respond to environmental hazards more quickly because the debtor will only be able to discharge claims associated with the cleanup of sites of which the EPA had actual notice prior to the bankruptcy.

Moreover, by establishing that a CERCLA claim only arises after the government incurs cleanup costs, it is submitted that debtors, as well as creditors, will be induced to prevent environmental violations if the scope of the discharge provision is narrowed.³¹ To the extent CERCLA claims are not dischargeable, gen-

³¹ See Robert Funsten & Alejandro Hernandez, *The Toxic Waste Generator in Bankruptcy: Should Environmental Cleanup Costs Be Given a Priority?*, 6 STAN. ENVTL. L.J. 108, 120. "Because [industrial waste generators] are most often the cause of the problems that lead to response cost liability, they are the cheapest and most efficient parties to remedy hazardous waste problems *ab initio*." *Id.* By placing the risk on those responsible for the pollution, the social costs are internalized. See Allen, *supra* note 11, at 1074 ("One of the goals of CERCLA, in fact, is to achieve [the] internalization of social costs, forcing the price of goods connected with hazardous waste to reflect the inevitable cleanup costs."). The externalities of pollution (costs unreflected in the price of a product) are effectively incurred by the responsible parties. *Id.* This will lead to higher production costs and therefore give the polluters an economic incentive to reduce pollution. See *id.* at 1073. See generally WERNER Z. HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* 8-11, 213-35 (1979) (discussing externalities and economic analysis of environmental pollution). Optimal resource allocation demands that those who pollute and those who are affected "take into account all external effects related to their resource decisions." *Id.* at 215.

eral unsecured creditors will receive less under the bankruptcy.³² Therefore, prior to entering into an agreement with a possible polluter, a creditor will be more likely to require that funds be set aside or insurance be obtained for future environmental liability in order to ensure that the government's claim does not adversely affect the creditor's interest.³³ Faced with more stringent requirements in its business dealings, a debtor will have an economic incentive *not* to pollute.³⁴

B. CERCLA Claims as an Administrative Expense

Another important issue concerning CERCLA claims is whether the EPA's response costs should receive priority as an administrative expense when the government, itself, undertakes to clean up a waste site.³⁵ Administrative expenses must be paid in full before any general unsecured claims are satisfied³⁶ because they are the "actual, necessary costs and expenses of preserving the estate."³⁷ If the release of hazardous substances occurred post-petition, courts generally agree that a claim for cleanup costs is related to "preserving the estate," and the cost is therefore consid-

³² See *In re Quanta Resources Corp.*, 739 F.2d 912, 926 (3d Cir. 1984) (Gibbons, J., dissenting) ("[S]ecured and unsecured creditors . . . become liable for the cost of cleanup merely by extending credit to a corporation which unknown to them should in the future violate the Law.").

³³ See, e.g., *Aetna Casualty and Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991) (finding CERCLA claims covered by comprehensive general liability insurance policy); *Savoy Medical Supply Co., Inc. v. F & H Mfg. Corp.*, 776 F. Supp. 703 (E.D.N.Y. 1991) (same). See generally 1A GRAD, *supra* note 3, § 4A.02[5], at 4A-148.2 (financial responsibility and insurance requirements under RCRA and CERCLA).

³⁴ See Allen, *supra* note 11, at 1073 ("Because credit would be more difficult to obtain, the cost of hazardous waste disposal would increase.").

³⁵ See generally Funsten & Hernandez, *supra* note 31, at 108. The issue of whether to accord an environmental claim priority over other claims arises because the monetary sums are often significant and can therefore adversely affect both the debtor's ability to reorganize and the unsecured creditors prospects of collecting on their claims. Funsten & Hernandez, *supra* note 31, at 125-26; see also *In re Dant & Russell, Inc.*, 853 F.2d 700, 709 (9th Cir. 1988) (cleanup costs estimated between \$10 and \$30 million, unencumbered assets of \$3 million).

³⁶ See 11 U.S.C. § 507 (a)(1) (1988); 3 COLLIER, *supra* note 16, ¶ 503.03 at 503.14; WEINTRAUB & RESNICK, *supra* note 5, ¶ 5.08 (discussing different types of administrative costs).

³⁷ See 11 U.S.C. § 503(b)(1)(A) (1988). Section 503(b)(1)(A) allows as administrative expenses, "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." *Id.* By giving certain creditors administrative priority, they are encouraged to engage in transactions with the debtor, and this in turn helps to facilitate the rehabilitation of a business. See *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986); 3 COLLIER, *supra* note 16, ¶ 503.04[1][a][i] at 503.23.

ered an administrative expense.³⁸

Less uniform, however, is the courts' treatment of post-petition response costs for the cleanup of pre-petition pollution. Some courts view compliance with state and federal environmental statutes as necessary to preserve the debtor's estate and therefore treat the government's claim for response costs as an administrative expense.³⁹ Other courts have refused to grant cleanup costs administrative priority, contending that such costs are simply pre-petition unsecured claims which share equally with other unsecured creditors in the remainder of the debtor's estate.⁴⁰

The better view is that costs of removing hazardous waste incurred post-petition are administrative expenses of the estate. If the government cleans up a waste site prior to a bankruptcy filing, its claim for response costs is clearly not entitled to administrative priority because at the time of the cleanup, there was no estate to preserve.⁴¹ However, if the government undertakes such removal action *after* the debtor files for bankruptcy, its claim for reimbursement is properly attributable to "preserving the estate" because the debtor cannot continue its business operations while in violation of environmental statutes.⁴² Therefore, post-petition re-

³⁸ See, e.g., *In re Smith-Douglass, Inc.*, 856 F.2d 12, 17 (4th Cir. 1988); *In re Vernon Sand & Gravel, Inc.*, 93 B.R. 580, 582 (Bankr. N.D. Ohio 1988); *In re Security Gas & Oil, Inc.*, 70 B.R. 786, 795 (Bankr. N.D. Cal. 1987). Cleanup costs, however, do not qualify as administrative expenses until costs are actually incurred. See *In re MicroFab, Inc.*, 105 B.R. 161, 166 (Bankr. D. Mass. 1989).

³⁹ See, e.g., *In re Wall Tube & Metal Prods. Co.*, 831 F.2d 118, 124 (6th Cir. 1987); *In re Stevens*, 68 B.R. 774, 783 (D. Me. 1987) (pre-petition contamination will lead to administrative expense).

⁴⁰ See *In re Dant & Russell, Inc.*, 853 F.2d 700, 708-09 (9th Cir. 1988) (denying administrative priority to cleanup costs because conduct giving rise to cleanup costs occurred pre-petition); *Southern Ry. v. Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985) (same). See generally 1A GRAD, *supra* note 3, § 4A.02[4] at 4A-148.1 (discussing courts' treatment of administrative expenses).

⁴¹ See WEINTRAUB & RESNICK, *supra* note 5, ¶ 4.01. Since an "estate" is created upon the filing of a bankruptcy petition, if the government had initiated and completed its cleanup action prior to the filing, such action would not be in furtherance of "preserving the estate" and would be denied administrative priority. *Id.*

⁴² See 28 U.S.C. § 959(b) (1988) (trustee and debtor in possession required to comply with state laws); *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985) (noting anyone in possession of hazardous waste site must comply with environmental laws); *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1084 (3d Cir. 1987) (pending Chapter 11 petition did not relieve company of legal obligation to comply with statutory, regulatory, or judicially imposed obligations); *In re Kaiser Steel Corp.*, 87 B.R. 662, 665 (Bankr. D. Colo. 1988). Where the debtor has pre-petition liability for contaminated property and the government cleans up the property post-petition, the government's claim should be paid as an administrative expense. *Id.* at 665. The debtor cannot continue operating without first complying

sponse costs, including those stemming from pre-filing violations, should be entitled to administrative expense priority.⁴³

II. STAYING CERCLA CLAIMS—THE GOVERNMENTAL EXCEPTION

Section 362 of the Bankruptcy Code imposes an automatic stay on most legal proceedings instituted against the debtor based on pre-petition claims.⁴⁴ The automatic stay relieves the debtor from the pressures of creditors' collection efforts and provides for the orderly administration of the estate for the benefit of all creditors.⁴⁵ The Code, however, provides exceptions to the automatic stay whereby certain actions are allowed to be commenced or maintained during the bankruptcy proceedings.⁴⁶

Section 362(b)(4) allows the bankruptcy court to lift the stay in order for a governmental unit to enforce its police or regulatory powers.⁴⁷ However, the government is prevented by section

with federal and state statutes. *Id.* To allow the debtor to operate without regard for its pollution would give the debtor an unfair advantage over its competitors. HIRSCH, *supra* note 31, at 215.

⁴³ See *In re Chateaugay Corp.*, 944 F.2d 997, 1009-10 (2d Cir. 1991). If there is a danger posed by the exposure to hazardous waste which arises pre-petition, the debtor cannot disregard an order to clean up the waste. Therefore, if the government cleans up the site post-petition, it is entitled to reimbursement as an administrative expense because the debtor "must maintain itself in compliance with applicable environmental laws." *Id.* at 1009.

⁴⁴ See 11 U.S.C. § 362 (1988). Upon filing for bankruptcy, § 362 stays the "commencement or continuation" of judicial or administrative actions against the debtor that could have been initiated prior to the commencement of the proceedings. *Id.* § 362(a)(1).

⁴⁵ See WEINTRAUB & RESNICK, *supra* note 5, ¶ 1.09[1]. The purpose of the stay is two-fold: (1) it gives the debtor time to organize its affairs in order to prepare for liquidation or reorganization, without having to fight the claims of its creditors, and (2) it protects all creditors by preventing the creditors who react quickly from depleting the assets of the estate to the detriment of their slower counterparts. *Id.*; see also *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985) ("[A]utomatic stay gives the bankruptcy court an opportunity to harmonize the interests of both debtor and creditors").

⁴⁶ See 11 U.S.C. § 362(b)(1)-(16). Among other things, the stay does not shield the debtor from criminal actions, alimony payments, notice of tax deficiencies, or government, police, or regulatory actions. *Id.*; see, e.g., *Bean v. People*, 72 B.R. 503, 505 (Bankr. D. Colo. 1987) (automatic stay not applicable to government actions to enforce criminal bail proceedings).

⁴⁷ 11 U.S.C. § 362(b)(4). The government's police and regulatory powers are designed to protect the public "health, welfare, morals, and safety." See *In re Ross*, 83 B.R. 673, 675 (Bankr. E.D. Mo. 1988), *rev'd on other grounds*, 104 B.R. 171 (Bankr. E.D. Mo. 1989). A governmental unit may bring an action against the debtor seeking to enforce compliance with federal or state laws, including environmental laws, which are valid exercises of its police or regulatory powers. See, e.g., *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1086 (3d Cir. 1987) (CERCLA action by U.S. pursuant to police and regulatory power not subject to automatic stay); *United States v. Nicolet, Inc.*, 81 B.R. 310, 312 (Bankr. E.D. Pa. 1987) (same), *aff'd*, 857 F.2d 202 (3d Cir. 1988). But see *NLRB v. Edward*

362(b)(5) from enforcing a money judgment.⁴⁸ The question thus arises as to whether an action under CERCLA is a valid exercise of the EPA's police or regulatory powers pursuant to section 362(b)(4) or merely an attempt to enforce a money judgment pursuant to section 362(b)(5).⁴⁹

The legislative history indicates that section 362(b)(4) was designed to permit the government to pursue actions aimed at protecting the public health and safety, and not actions to protect its "pecuniary interest."⁵⁰ Thus, courts have held that an injunction

Cooper Painting, Inc., 804 F.2d 934, 941 (6th Cir. 1986) (not every government action excepted from stay).

"Section 362(b)(4) indicates that the stay under 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power." 124 CONG. REC. H11089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6444.

⁴⁸ 11 U.S.C. § 362(b)(5) (1988). *See, e.g., In re* 1600 Pasadena Offices Ltd., 64 B.R. 192, 194 (Bankr. M.D. Fla. 1986) (government not excepted from stay if seeking to enforce money judgment); *In re Hoffman*, 53 B.R. 874, 875 (Bankr. D.R.I. 1985) ("[G]overnment action with a pecuniary purpose (debt collection) does not fall within the exception to [automatic stay] allowing regulatory action against debtors or their estates in order to protect the public health and safety."), *aff'd*, 65 B.R. 985 (Bankr. D.R.I. 1986).

Allowing the government to enforce a money judgment would give it an unfair advantage over other creditors subject to the stay. *See* H.R. REP. NO. 595, *supra* note 9, at 343, *reprinted in* 1978 U.S.C.C.A.N. at 6299; S. REP. NO. 989, *supra* note 16, at 52, *reprinted in* 1978 U.S.C.C.A.N. at 5838. The government may enter a money judgment, but it may not enforce it against the debtor. *See* WEINTRAUB & RESNICK, *supra* note 5, ¶ 1.09[4].

⁴⁹ *See* 11 U.S.C. § 362(b)(4), (b)(5). The applicable subsections of 362(b) provide that: The filing of a petition [in bankruptcy] . . . does not operate as a stay- . . .

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

Id.; *see, e.g., City of New York v. Exxon Corp.*, 112 B.R. 540, 545 (Bankr. S.D.N.Y.) (City's action under CERCLA not stayed), *aff'd in part*, 932 F.2d 1020 (2d Cir. 1990); *see also* 2 COLLIER, *supra* note 16, ¶ 362.05[4] ("greatest amount of judicial activity under section 362(b)(4) has to do with the enforcement of environmental laws").

⁵⁰ *See* 124 CONG. REC. H11089, (daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6444-45. In discussing the extent to which 362 (b)(4) exempts government actions from the stay, Senator Edwards stated:

This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

Id.; *see also In re Aegean Fare, Inc.*, 35 B.R. 923, 927 (Bankr. D. Mass. 1983) (government actions "aimed at obtaining a pecuniary advantage" are stayed while actions representing direct application of unit's police or regulatory power are not).

ordering the debtor to cease and desist polluting is consistent with the protection of the public welfare and is not subject to the automatic stay.⁵¹ Courts disagree, however, as to whether injunctions seeking to compel the debtor to clean up a hazardous site are the equivalent of money judgments and therefore subject to the stay.⁵² The courts that have refused to lift the stay on a government agency's order to clean up contaminated property reason that compelling the polluter to spend funds that the government could otherwise spend itself is in essence an action aimed at protecting the government's "pecuniary interest."⁵³

The Sixth Circuit Court of Appeals, in *In re Kovacs*,⁵⁴ stayed the government's attempts to require the debtor to clean up a hazardous waste disposal site.⁵⁵ After the polluter failed to comply with an order to remove hazardous materials at its dump site, the State of Ohio appointed a receiver to take possession of the polluter's property and effect the cleanup order.⁵⁶ Subsequently, the polluter filed for bankruptcy, and the government sought to assert

⁵¹ See, e.g., *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 388-89 (3d Cir. 1987); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1184-86 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *United States v. Ilco, Inc.*, 48 B.R. 1016, 1024 (Bankr. N.D. Ala. 1985).

⁵² Compare *Commonwealth Oil*, 805 F.2d at 1186-89 (holding enforcement action requiring compliance with environmental laws not stayed even though debtor would have to expend funds) with *In re Robinson*, 46 B.R. 136, 139 (Bankr. M.D. Fla. 1985) (concluding government's order to clean up marsh land was equivalent of money judgment since it involved direct expenditure of estate funds), *rev'd on other grounds*, 55 B.R. 355 (Bankr. D.C. Fla. 1985). See also Richard J. DeMarco, Jr., Note, *Clean-up Orders and the Bankruptcy Code: An Exception to the Automatic Stay*, 59 ST. JOHN'S L. REV. 292, 306-14 (1985) (discussing money judgments under § 362(b)(5)).

⁵³ See *infra* text accompanying notes 54-58.

⁵⁴ 681 F.2d 454, 456 (6th Cir. 1982) (*Kovacs I*), *vacated and remanded*, 459 U.S. 1167 (1983). The *Kovacs* decision was vacated and remanded by the Supreme Court in order to determine whether the automatic stay issue had become moot. See *id.* at 1167. The mootness issue arose because the bankruptcy court had held that the cleanup obligation was a dischargeable debt, and the appeal of that decision was pending in the Sixth Circuit at the time that the Supreme Court was addressing the automatic stay issue. See *In re Kovacs*, 29 B.R. 816 (Bankr. S.D. Ohio 1982), *aff'd*, 717 F.2d 984 (6th Cir. 1983), *aff'd sub nom.*, *Ohio v. Kovacs (Kovacs II)*, 469 U.S. 274 (1985). On remand, the Sixth Circuit held that the decision in *Kovacs II*—discharging the debtor's environmental obligations—had rendered the automatic stay issue moot in *Kovacs I*. *Kovacs I*, 755 F.2d 484 (6th Cir. 1985). Nevertheless, the Supreme Court in *Kovacs II* accepted the Sixth Circuit's reasoning in *Kovacs I* and held that where the debtor lacked the ability and resources to perform the cleanup, the state was seeking no more than a money judgment as an alternative to requiring the debtor to personally perform the obligations imposed by the injunction. See *Kovacs II*, 469 U.S. at 283-84 n.11.

⁵⁵ 681 F.2d at 456.

⁵⁶ *Id.* at 454.

the cleanup order in the bankruptcy proceedings.⁵⁷ Recognizing that the debtor could no longer personally perform the cleanup, the court held that the state was seeking "what in essence amounted to a money judgment."⁵⁸ Similarly, in *United States v. Johns-Manville Sales Corp.*,⁵⁹ the district court refused to lift the stay on an injunction requiring the cleanup of an asbestos waste site because the action would involve "the expenditure of substantial funds [of the estate]."⁶⁰ In addition, the *Manville* court was concerned that diverting assets of the estate for the cleanup would harm the victims of asbestos-related injuries who had claims against the estate.⁶¹

The majority of courts, however, will vacate the stay on a cleanup order even though compliance may entail the expenditure of estate funds.⁶² In *Penn Terra Ltd. v. Department of Environmental Resources*,⁶³ the Court of Appeals for the Third Circuit held that an injunction to backfill a mine site was not an attempt to enforce a money judgment, but rather a valid exercise of the state's power to protect the health, safety, and welfare of the public pursuant to the language of section 362(a)(4).⁶⁴ In its determi-

⁵⁷ *Id.* at 455. After the debtor had filed for bankruptcy, the State of Ohio filed a motion for a hearing to determine the debtor's current employment status and income. *Id.* The debtor moved to have the action stayed pursuant to section 362(a). *Id.*

⁵⁸ *Id.* at 456. The Sixth Circuit agreed with the bankruptcy court's assessment that the state sought the information on the debtor's income "as a preliminary to requesting an order from [the trial court] which would require that part of debtor's current income be applied' to the receiver's efforts to complete [the debtor's] unfulfilled obligation to clean up the industrial wastes." *Id.* at 455.

⁵⁹ 18 Env't Rep. Cas. (BNA) 1177 (D.N.H. 1982).

⁶⁰ *Id.* at 1178-79. In *Manville*, the United States and the State of New Hampshire sought injunctions to require the Johns-Manville Sales Corporation to remove and abate the dangers posed by its asbestos dump sites. *Id.*

⁶¹ *Id.* at 1181. The court stated that because there were other parties whom the government could hold liable for cleanup obligations—as well as tens of thousands of current and future claimants of asbestos-related injuries who would lose the opportunity to collect from the debtor—it would not lift the stay on the government's motion. *Id.* at 1179 n.11, 1180-81. The court also pointed out that the government could have removed the hazardous materials itself. *Id.* at 1178.

⁶² See, e.g., *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1178 (5th Cir. 1986); *Penn Terra Ltd. v. Dep't of Envtl. Resources*, 733 F.2d 267, 274 (3d Cir. 1984); *In re Kaiser Steel Corp.*, 87 B.R. 662, 666 (Bankr. D. Colo. 1988); see also 2 COLLIER, *supra* note 16, ¶ 362.05[4].

⁶³ 733 F.2d 267 (3d Cir. 1984).

⁶⁴ *Id.* at 274-75. ("No more obvious exercise of the State's power to protect the health, safety, and welfare of the public can be imagined."). The court stated that § 362(a)(4) should be construed broadly, while § 362(a)(5) should be interpreted narrowly so as to leave the states "as much of their police power as a fair reading of the statute allows." *Id.* at 273.

nation, the court focused on whether the nature of the claim was preventive or compensatory and stated that it is unlikely that an action which "seeks to prevent culpable conduct *in futuro* will, in normal course, manifest itself as an action for a money judgment."⁶⁵ In reversing both the bankruptcy and district courts, the Third Circuit stated that the mere expenditure of funds will not necessarily render an action one for money damages because "in contemporary times, almost everything costs something."⁶⁶

This approach was extended in *United States v. Standard Metals Corp.*,⁶⁷ in which the court declined to stay the enforcement of a \$25,000 fine for violations of a settlement pursuant to the Clean Water Act.⁶⁸ Emphasizing that "[e]nvironmental laws are enforced in a variety of ways," the court held that a monetary penalty was an appropriate enforcement mechanism of the government's police and regulatory powers.⁶⁹ The court acknowledged that although the injunction might appear to protect the government's pecuniary interest,⁷⁰ the deterrence function of the fine

⁶⁵ *Id.* at 277. The court stated that in determining whether an action is to enforce a money judgment, the focus should be on whether the remedy would "compensate for *past* wrongful acts resulting in injuries already suffered, or protect against potential *future* harm." *Id.* (emphasis in original). The court held that the government's action was not intended to provide compensation for past injuries. *Id.* at 278.

⁶⁶ *Id.* The debtor relied on *Kovacs I* for the proposition that the expenditure of estate funds is in essence a money judgment, regardless of how the government cloaks its claim. *Id.* at 277. The court opined that the *Kovacs I* decision was unduly broad and if followed, would narrow § 362(a)(4) into "virtual nonexistence." *Id.* at 278. "An injunction which does not compel some expenditure or loss of monies may often be an effective nullity." *Id.* However, the Supreme Court holding in *Kovacs II* may undermine the authority of this decision. See *Ohio v. Kovacs*, 469 U.S. 274, 283-84 n.11 (1985) ("The automatic stay provision does not apply to suits to enforce the regulatory statutes of the State, but the enforcement of such a judgment by seeking money from the bankrupt . . . is another matter.").

⁶⁷ 49 B.R. 623 (Bankr. D. Colo. 1985).

⁶⁸ *Id.* at 624. The debtor reached a settlement agreement with the government which stipulated that the government would suspend a \$25,000 fine for violation of the Clean Water Act so long as the debtor "did not exceed certain effluent limitations" on zinc discharges. *Id.* at 623. The government alleged that the debtor violated the agreement and demanded payment of the fine. *Id.* at 624.

⁶⁹ *Id.* at 624-25. The court noted that in addition to injunctive relief, the imposition of a fine for the violation of environmental statutes is a valid exercise of the government's police and regulatory power. *Id.* The fine was designed to "provide the [debtor] with an incentive to exercise care to *prevent* releases of pollutants." *Id.* at 625 (emphasis in original).

⁷⁰ See *id.* at 625. "If consideration of the fine mechanism is confined to the time after the release occurred, it may appear that the government is merely trying to protect a pecuniary interest in collecting the fine." *Id.*

served to prevent the release of hazardous substances.⁷¹ Furthermore, the court cautioned that by imposing the stay, a party in a "precarious financial condition" would have "little incentive to guard against environmental pollution," thereby jeopardizing the public's health, safety, and welfare.⁷²

It is submitted that the majority view is correct in that requiring the removal of hazardous waste is not the equivalent of enforcing a money judgment within the scope of section 362(b)(5). The police and regulatory powers of the government are designed to protect and promote the general public health, safety, and welfare.⁷³ Since an order to remove hazardous and toxic substances is aimed directly at protecting the public's safety,⁷⁴ it should not be stayed solely because it will have the ancillary effect of requiring the expenditure of estate funds.⁷⁵ Moreover, the public health, safety, and welfare is obviously paramount to the Code's policy of

⁷¹ See *id.*

⁷² *Id.* The imposition of a stay on the government's action would defeat the purpose of § 362(b)(4) which is, under the court's definition, "to prevent endangerment of the public that would result from permitting a bankrupt to avoid statutes and regulations enacted in furtherance of governmental police powers." *Id.*; see also *United States v. Mattiace Indus., Inc.*, 73 B.R. 816, 819 (Bankr. E.D.N.Y. 1987). In *Mattiace*, the government brought an action against the debtor seeking: (1) \$1 million in response costs; (2) civil fines and punitive damages for failure to comply with EPA cleanup orders; and (3) injunctive relief to prevent and monitor further pollution. *Id.* at 816. The court held that the government's actions fell within § 362(b)(4) so as to authorize lifting the stay. *Id.* at 819. "Even where the United States seeks punitive damages or [cleanup costs] . . . thereby arguably protecting its own pecuniary interest, the deterrence function of the relief sought will render the action one to protect the public health, safety, and welfare." *Id.*

⁷³ See *In re Ross*, 83 B.R. 673, 675 (Bankr. E.D. Mo. 1988), *rev'd on other grounds*, 104 B.R. 171 (Bankr. E.D. Mo. 1989).

⁷⁴ See S. REP. NO. 989, *supra* note 16, at 52, *reprinted in* 1978 U.S.C.C.A.N. at 5838; H.R. REP. NO. 595, *supra* note 9, at 343, *reprinted in* 1978 U.S.C.C.A.N. at 6299. The legislative history behind the section 362(b)(4) exception states:

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

Id. (emphasis added). See, e.g., *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267, 274 (3d Cir. 1984) ("No more obvious exercise of the State's power to protect the health, safety, and welfare of the public can be imagined."); *In re Kaiser Steel Corp.*, 87 B.R. 662, 666 (Bankr. D. Colo. 1988) (enforcing state's environmental laws constitutes proper exercise of its regulatory or police powers).

⁷⁵ See *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1187-88 (5th Cir. 1986) (compelling compliance with environmental statute is not, in form or substance, action to enforce money judgment), *cert. denied*, 483 U.S. 1005 (1987).

allowing debtors a "breathing spell" from creditor's claims.⁷⁶

III. ABANDONMENT OF CONTAMINATED PROPERTY

Upon the filing of a bankruptcy petition, the court may appoint a trustee to oversee and administer the debtor's estate.⁷⁷ The Bankruptcy Code grants trustees a potent arsenal of powers to maximize the value of the estate for the benefit of general creditors.⁷⁸ Among these is the power to abandon any property of the estate that is "burdensome to the estate or that is of inconsequential value and benefit to the estate."⁷⁹ A trustee will abandon property if it is so heavily encumbered by liens or security interests that the expenses of maintaining the property outweigh the benefits to the estate.⁸⁰

The costs of complying with environmental laws such as CERCLA can quickly deplete a debtor's assets.⁸¹ If a hazardous waste site is worth less than the cost of a cleanup, the trustee will at-

⁷⁶ See Allen, *supra* note 11, at 1065-66 ("Congressional policy . . . dictates that courts favor protection of the public health and safety over protection of economic interests . . .").

⁷⁷ See 11 U.S.C. §§ 701, 1104 (1988). If the debtor files for bankruptcy under Chapter 7 a court will automatically appoint a trustee to govern the estate. *Id.* § 701(a) ("Promptly after the order for relief under [Chapter 7] . . . to serve as interim trustee in the case"). In a Chapter 11 proceeding, the debtor may remain in possession of the estate because the goal of Chapter 11 is the rehabilitation of the debtor, and often the debtor is the party best able to accomplish this goal. 5 COLLIER, *supra* note 16, ¶ 1104.01 at 1104-16, 17 (citing H.R. REP. NO. 595, *supra* note 9, at 232-33, reprinted in 1978 U.S.C.C.A.N. at 6192). However, upon request of creditors, or for showing of cause, the court can appoint a trustee to administer the estate. See 11 U.S.C. § 1104 (1988). The trustee in bankruptcy is the representative of the estate. 11 U.S.C. § 323(a).

⁷⁸ See 11 U.S.C. §§ 365, 547, 548 (1988). A trustee can do many things in bankruptcy to affect a creditor's rights which the debtor could not do outside of bankruptcy. For example, a trustee can set aside certain liens, recover property that had previously been transferred to third parties, assign contracts that contain anti-assignment clauses, and reject or assume executory contracts and unexpired leases. See generally WEINTRAUB & RESNICK, *supra* note 5, ¶ 7 (trustee's powers).

⁷⁹ See 11 U.S.C. § 554(a) (1988); S. REP. NO. 989, *supra* note 16, at 92, reprinted in 1978 U.S.C.C.A.N. at 5878. Once the trustee abandons the property, the property reverts back to the debtor as if the bankruptcy was never commenced, or to another party holding a possessory interest in the property. See 4 COLLIER, *supra* note 16, ¶ 554.02[2].

⁸⁰ See *In re K.C. Mach & Tool Co.*, 816 F.2d 238, 246 (6th Cir. 1986) (permitting trustee to abandon property not beneficial to estate); *Bryson v. Bank of New York*, 584 F. Supp. 1306, 1316 (S.D.N.Y. 1984) (allowing trustee to abandon any asset deemed to be less valuable than cost of recovering it); *In re Smith-Douglass, Inc.*, 75 B.R. 994, 998 (Bankr. E.D.N.C. 1987) ("The underlying purpose of abandonment is to allow the trustee to efficiently reduce the debtor's property to money for distribution to creditors."), *aff'd*, 856 F.2d 12 (4th Cir. 1988).

⁸¹ See *supra* note 3 (staggering costs of removal actions).

tempt to abandon the contaminated property rather than incur the cleanup costs.⁸² However, courts have refused to allow a trustee to abandon property where doing so would pose an "imminent danger" to the public's health and safety.⁸³

In *Midlantic National Bank v. New Jersey Department of Environmental Protection*,⁸⁴ the United States Supreme Court held that a trustee cannot abandon property in contravention of a state or federal environmental statute which is "reasonably designed to protect the public health or safety from identified hazards."⁸⁵ The Supreme Court concluded that Congress did not intend the Code's abandonment provision to preempt state and local laws.⁸⁶ Central to the Court's decision was its concern that abandoning the property would present an "imminent and substantial" danger to the public's health.⁸⁷

⁸² *In re Oklahoma Ref. Co.*, 63 B.R. 562, 565-66 (Bankr. W.D. Okla. 1986) (estimating cost of cleanup to be at least \$2.5 million while land worth \$100,000).

⁸³ *In re FCX, Inc.*, 96 B.R. 49, 55 (Bankr. E.D.N.C. 1989) (disallowing abandonment because burial of pesticides constituted immediate danger to public health); *In re Stevens*, 68 B.R. 774, 780 (Bankr. D. Me. 1987) (disallowing abandonment of drums containing PCB's because it would pose health threat to public).

⁸⁴ 474 U.S. 494 (1986).

⁸⁵ *Id.* at 507.

⁸⁶ *Id.* at 505-06. The Court relied in part on 28 U.S.C. § 959 (1983) which allows the trustee or debtor in possession to be sued by third parties and therefore requires that the estate be managed and operated in conformance with all applicable laws. *Id.* Section 959 provides in pertinent part:

(a) [t]rustees, receivers or managers of any property, including debtors in possession, may be sued, . . . with respect to any of their acts or transactions in carrying on business connected with such property

(b) . . . a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. § 959 (1988); see, e.g., *In re Environmental Waste Control, Inc.*, 125 B.R. 546, 548 (Bankr. N.D. Ind. 1991) (requiring trustee to comply with environmental laws).

⁸⁷ *Midlantic*, 474 U.S. at 506 (citing 42 U.S.C. § 6973 (1983)). In *Midlantic*, the debtor, Quanta Resources Corporation (Quanta), processed waste oil at two of its facilities. *Id.* at 497. The New Jersey Department of Environmental Protection (NJDEP) discovered that Quanta had accepted several thousand gallons of oil contaminated with polychlorinated biphenyls (PCB's) in violation of its operating permit. *Id.* NJDEP issued an administrative order requiring Quanta to clean up the site. *Id.* Pursuant to § 554, the trustee attempted to abandon the two facilities because cleaning up the property and maintaining full-time security guards to prevent trespassing by outsiders created financial burdens, and the property was of inconsequential value to the estate. *Id.* at 498. The bankruptcy court approved the abandonment, concluding that "[t]he City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the

The Court noted, however, that its holding was narrow and did not encompass speculative or indeterminate future violation of environmental laws.⁸⁸ Thus, subsequent courts have limited *Midlantic's* holding to cases involving property which creates an imminent danger⁸⁹ and have permitted abandonment when it does not threaten the public health and safety, even though such action violates state or federal statutes.⁹⁰

Moreover, the *Midlantic* decision does not absolutely bar trustees from abandoning contaminated property⁹¹ because the Supreme Court expressly declined to resolve the issue of whether "certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself."⁹² Often, forced compliance with environmental statutes can eliminate any possibility of a successful reorganization.⁹³ Therefore, courts must balance the risks to the public against the advantage to creditors in determining whether abandonment should be allowed or whether the trustee must comply with the environmental laws.⁹⁴

public against the dangers posed by the PCB-contaminated facility." *Id.* The district court affirmed. *Id.* On appeal, the Court of Appeals for the Third Circuit reversed, stating that "[i]f trustees in bankruptcy are to be permitted to dispose of hazardous waste under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default." *In re Quanta Resources Corp.*, 739 F.2d 912, 921 (3d Cir. 1984).

⁸⁸ *Midlantic*, 474 U.S. at 507 n.9.

⁸⁹ See *In re Corona Plastics, Inc.*, 99 B.R. 231, 235-36 (Bankr. D.N.J. 1989); *In re Purco, Inc.*, 76 B.R. 523, 533 (Bankr. W.D. Pa. 1987); *In re Franklin Signal Corp.*, 65 B.R. 268, 271-72 (Bankr. D. Minn. 1986).

⁹⁰ See, e.g., *In re Smith-Douglass, Inc.*, 856 F.2d 12, 17 (4th Cir. 1988). In *Smith-Douglass*, the Court of Appeals for the Fourth Circuit affirmed a bankruptcy court's finding that "unconditional abandonment was appropriate in light of the estate's lack of unencumbered assets, coupled with the absence of serious public health and safety risks." *Id.*; see also *In re Anthony Ferrante & Sons, Inc.*, 119 B.R. 45, 50-51 (D.N.J. 1990) (permitting trustee to abandon public water supply system in contravention of state environmental regulations where no showing of "imminent and identifiable harm" to public); *In re Franklin Signal*, 65 B.R. at 273-74 (allowing trustee to abandon 14 drums of chemicals because estate had sufficient funds to dispose of them and no threat to public).

⁹¹ *Midlantic*, 474 U.S. at 507.

⁹² *Id.*

⁹³ See *In re Oklahoma Ref. Co.*, 63 B.R. 562, 565-66 (Bankr. W.D. Okla. 1986) ("To require strict compliance with State environmental laws . . . would derogate the spirit and purpose of the bankruptcy laws requiring prompt and effectual administration within a limited time period.").

⁹⁴ See *supra* note 90 and accompanying text.

CONCLUSION

The dischargeability of CERCLA liability in bankruptcy removes a debtor's incentives to use its resources to clean up hazardous materials or otherwise comply with environmental regulations. On the other hand, narrowing potentially dischargeable claims, at least to those which the EPA is aware of, appropriately balances bankruptcy's fresh start policy with CERCLA's aim of protecting the public health, safety, and welfare. Furthermore, conferring administrative priority to CERCLA claims, enforcing injunctions requiring debtors to cease polluting or clean up waste, and preventing trustees from abandoning dangerous property will all ensure that responsible parties pay for their damage to the environment and will actually provide incentives for debtors to comply with environmental laws. To date, many courts have accorded priority to the policies underlying the Bankruptcy Code at the expense of CERCLA's goal of protecting the environment. It is submitted, however, both as a matter of law and of policy, that the protection of society as a whole must take precedence over the rehabilitation of individual and corporate debtors.

J. Ricky Arriola

